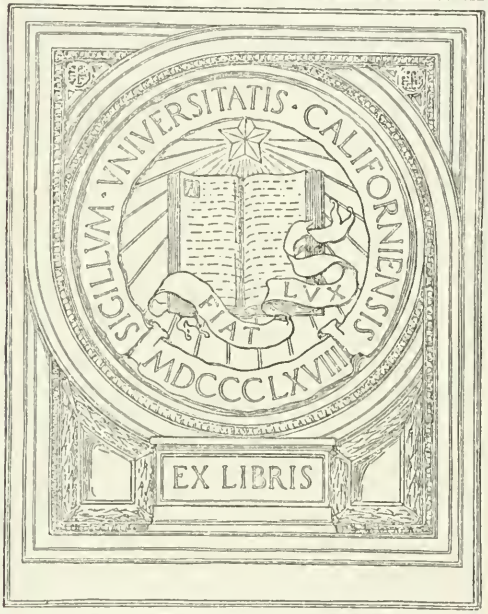
Argument...Before the
Committee on the Judiciary

by
Edgar F. Brown



ARGUMENT

OF

EDGAR F. BROWN,

BEFORE THE

COMMITTEE ON THE JUDICIARY

OF THE

House of Representatives, at Washington,

JANUARY 28TH, 1876,

ON BEHALF OF CERTAIN

Claimants under the Geneva Award.

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ARGUMENT BY EDGAR F. BROWN

BEFORE THE COMMITTEE ON THE JUDICIARY OF THE HOUSE OF REPRESENTATIVES AT WASHINGTON, JANUARY 28, 1876, ON BEHALF OF CLAIMANTS TO THE FUND PAID BY GREAT BRITAIN TO THE UNITED STATES UNDER THE GENEVA AWARD.

Mr. Chairman and Gentlemen of the Committee:

I have listened with interest to the arguments which have been made before you on behalf of the various claimants to the fund paid by Great Britain to the United States under the Geneva Award. These claimants have arranged themselves under two classes, the one asking to be indemnified for *actual losses sustained*, and the other to receive about five millions of dollars which is to be added to profits already received, growing out of the hazard of insuring owners of vessels and cargoes against loss by the so called "confederate cruisers" during our late civil war.

It is apparent that all persons who have received no remuneration for their losses are entitled to be first paid from this fund, unless a special trust or interest attaches to it in favor of the underwriters as insurers, who have been large gainers by the business of insuring against these war risks—Documentary Evidence of the nature of the claims

presented by this Government against England before the Tribunal of the proceedings had before it and of the nature of the award made by it has been so fully set forth and cited in the printed arguments of counsel already before you, that it would seem needless for me to do more than made reference to such of them as may bear upon the question of the obligation of the United States in relation to the *distribution* of these moneys.

From my reading of these documents, and in listening to the arguments made before you by representatives of all claimants, I find that we all substantially agree to these facts, viz., that the arbitration was *wholly international* in its character and jurisdiction, that the principal claims against Great Britain were based upon *national grounds*, consisting of the alleged *violation by England of her obligations as a neutral* government towards the United States in the *too hasty recognition of a state of* belligerency, which was the principal and *initial* cause of all the losses sustained by any of the claimants. That no *specific* claims were adjusted. That claims of *underwriters* were *expressly* reserved. And, finally, that a *sum in gross* was paid as damage to the *United States*, which that Government insisted should be paid disencumbered of *every trust*, and with full power to distribute it amongst its citizens who *suffered loss* as *it* should deem expedient and just, and to which demand England *acceded*.

The great question then for Congress to determine in the distribution of the remaining moneys paid to the United States by Great Britain under the Geneva Award is, whether it is at liberty to indemnify the loyal citizens of America for *actual losses* sustained by the acts of the Confederate cruisers, British

built, or receiving aid in men, armament and provisions in British ports, or whether this Government is obligated in law or in equity to pay these moneys to corporations that have made large profits in the business of insuring against war risks. These corporations are the only claimants before you who are *not* losers, and their claims are resisted by all others upon this ground *alone*. The claims of underwriters are made upon the ground that the Tribunal found Great Britain liable only for the acts of the Alabama, Florida, and Shenandoah after leaving Melbourne; while the records of the proceedings show that *nearly all of the cruisers* that *caused* the damage for which redress is now sought, received in a greater or less degree *aid* in men, armament and supplies in British ports. The Florida, Alabama, Georgia, Tallahasse, Chickamanga, and Shenandoah were British built cruisers, three of which, the *Alabama*, *Georgia*, and *Shenandoah* were never in a port of the *Confederates States*. All the other vessels, except the Boston, Jefferson Davis, Sallie and one or two others, *had* received aid from British subjects in British ports. The claims for damages by those vessels *only* were excluded upon the ground that there was *no evidence* to sustain them.

The damage done by the Alabama and her tenders reached the enormous sum of $7,050,293.76; by the Shenandoah, $6,656,838.81; and by the Florida, $4,293,869.60; by the Chickamanga, $183,070.73; by the Georgia, $431.160.72; and by the Tallahasse, $836,841.83. These claims were subject to large reductions including prospective earnings, double claims for the same loss, &c.; but this aggregate of claims presented before the Tribunal of about $20,000,000 for losses occurring by the acts of British built vessels will show how diminutive were

the losses sustained by such vessels as had never reached a British port. It was by reason of the plain *violation* of the duties of a neutral nation in furnishing this aid, that Great Britain was called to account. It was shown that her *too precipitate recognition of belligerent rights* was the initiatory and real cause of *all these losses*.

England was not, therefore, exculpated from the payment of a large portion of these claims for loss upon the ground that her subjects did not *furnish the means of destruction in her own ports*, but upon the ground that our government failed to *officially notify* her of the acts complained of in time to hold her responsible as a nation for permitting the wrong.

If our Government was at all in fault in this respect how reasonable that in accepting *a gross sum* in full satisfaction of *all* the claims now represented before this Committee and presented before the Geneva Tribunal, it should insist upon the right to distribute the money amongst its citizens according to *equity and justice*, thus protecting all who had suffered loss before granting *any* indemnity to those who had been so fortunate as to realize *large profits* by the hazard of insurance against war risks.

Mr. Fish, in his letter of instructions, says, "The "President desires me to have the subject discussed "as one between the two Governments * * * "to secure if *possible* the award of a sum in gross. "And in the treatment of the *entire* case you will be "careful *not* to commit the Government as to the "disposition of what may be awarded. The "Government wishes to hold *itself free to decide* as "to the *rights* and *claims* of *insurers*. If the value "of the property captured or destroyed be recovered

"in the name of the Government, the distribution of "the amount recovered will be made by this Govern- "ment without committal as to the mode of distribution." It is *not denied* that these instructions were *received* by the counsel, that the case was thus presented and that *England acquiesced* in the *demand*, and a sum *was awarded* in *gross without calculation* as to any item, under the *7th article* of the *treaty*, in *satisfaction and discharge of all the claims* presented, and all that might exist on behalf of the United States, or its citizens, which grew out of the causes which had to the arbitration. Our Government then received the money with the right *conceded to distribute* it as though it came from its *own Treasury*, *disencumbered* of *any trust* or *obligation* to disburse it amongst any particular class of claimants and entirely free to do justice to all.

Mr. Cushing, counsel for our Government, in his book upon Alabama claims, says:

"The award is to the United States, in conformity "with the letter of the treaty, which has for its "well-defined object to remove and adjust com- "plaints and claims on the part of the United "States."

"But the history of the treaty and of the arbi- "tration, shows that the United States recover, not "for the benefit of the American *Government* as "such, but of such individual citizens of the United "States *as shall appear to have suffered loss* by the "acts or neglects of the British Government. It is "however, he says, not a *special trust legally af- "fected to any particular claim or claimants*, but "a general fund to be administered by the United "States in *good faith*, in conformity with their *own* "conceptions of *justice* and *equity*, *within* the range "of the award. * * Nor does the tribunal

"define affirmatively *what* claims should be satis-
"fied otherwise than in the comprehensive terms of
"the award, which declares that the sum *awarded*
"is 'the *indemnity* to be paid by Great Britain to
"the United States for the satisfaction of *all* the
"claims referred to the consideration of the tribu-
"nal, conformably to the provisions contained in
"article *VII* of the aforesaid treaty." He further says. "The arbitrators, be it observed, do not say
"for the satisfaction of *certain specific claims*
"among those referred to the consideration of the
"tribunal, but of '*all the claims*' so referred con-
"formably to the provisions of the treaty."

This would seem to be a fair statement and view of the situation of the fund in question and the doctrine of subrogation invoked on behalf of underwriters has no application to the case presented before you. The owner of the property destroyed by the Alabama, Florida or Shenandoah, has no interest in the fund which he could enforce, if uninsured, either in the courts or by international law, it was not paid as *his money*. The Government *refused* to *receive it as such*. The application for relief is now made by all the claimants as a *gratuity*. If appropriated it must be done *ex gratia* and upon no other principle.

The law of subrogation gives the insurer who stands in the relation of *surety to his principal* when *he pays the loss* the right to the property insured after abandonment, as also the *right of* action against a wrongdoer who causes the loss. But it is not claimed that any right of action accrued to the *assured*, or the *assurer* for the destruction of this property, *either against Great Britain* or any one else. *No dictum* of any writer on *international* law, has been cited to that effect. In fact our *mu-*

nicipal law prohibits the making of such *a claim*, and any claim upon this nation through Congress for indemnification could rest only upon the duty of the Government to protect its citizens which is answered in this case by the fact that all reasonable diligence was used and therefore the application must be *ex gratia* for such reparation as the Government may deem proper to grant.

The decision in the case of Comegys *v.* Vasse, (1 Peters, 193), and kindred cases cited in behalf of the underwriters to substantiate their right by subrogation, was based upon the fact that by the 7th ssection of the treaty with Spain, the *claims of the citizen were recognized*. The treaty *recited* that as the municipal law was inadequate "a full and com- "plete compensation will be made by the British "Government *to the complainants*." No such provision is contained in the treaty relating to Alabama Claims, and the case cited is not an authority establishing any right in the insurance companies to this fund.

The companies however ask you to apply a doctrine which a court could *not enforce* in order that you may do a *gross injustice*, viz. to add to their *enormous profits* at the expense of the very *persons* through *whom* these profits were *derived* and who have not only lost the money they were compelled to pay for protection, but other large sums in the interuption and diversion of their trade.

The question which you are free to determine between these claimants is, whether those who have lost nothing but are large gainers by the misfortunes of others, ought to be paid an additional profit, to the exclusion of persons who are actual sufferers and losers, and who have received no remuneration for their losses. This is the precise sit-

nation and relation of the claims of the numerous merchants I represent to those of the underwriters. If it be said that the payment of these war premiums was a *measure of fear or cowardice*, I answer that no merchant could have continued his buisness a month without insuring against war risks, he could not obtain a dollar's worth of goods at home or abroad on credit, without a clean policy against this risk for the benefit of his creditor, as no merchant was independent of credit.

The courts early decided that the underwriter was not liable for loss upon a policy for marine risks, when the loss occurred by the acts of Confederate cruisers. The shipper was then compelled to insure against war risks, increasing the expense of insurance three-fold.

It has been said that the merchant paying these excessive rates charged them in the cost of his goods and lost nothing. This allegation is in no sense true. A large portion of the American carrying trade was transferred to neutral bottoms insured at ordinary rates, as these vessels were *free* from danger of capture, and *competition* through this channel refutes the idea that any merchant could control the market price of the world in *his line of merchandising*, there was no monopolizing power to that extent in the hands of any one who now makes claim to this fund.

The underwriters express their willingness in asking for the balance of this fund to confine themselves to the acts of the Alabama, Florida, and Shenandoah after leaving Melbourne because the Geneva Tribunal found England at fault as regards these vessels only, although their losses by all the vessels have been provided for. They claim that the money was paid to indemnify the persons who

lost by these vessels, while the other claimants are losers by *all*, or nearly all the cruisers, and therefore should be first paid, ignoring the facts that the great arbitrataion was chiefly constituted for the settlement of *international* rights. That the subject of *money* damage was *incidental* and as far as possible avoided by our Government. That while by the tenth article of the treaty assessors might have been appointed to prove specific claims, the money was paid as a *gross* sum under the seventh article, in satisfaction not of *insurance claims* or war *premium claims*, (for both these claims were rejected for being doubly presented,) or any particular class of claims, but of *any* and *all just* claims of the nation and of its citizens, with the right of distribution *absolutely* and *unqualifiedly* resting with our Government to which it was paid, and while actual sufferers *might*, England could *not* complain even though the United States should cover this money into the treasury for the nation's benefit.

The right of claimants to this fund does *not* depend on the question of the *negligence* of the English Government in letting the three vessels escape, but upon the facts that *all* the vessels that destroyed the property and created the losses, did receive aid and support in *men*, *provisions* and *armament* in British ports; and *but* for this and the too early recognition of belligerent rights by Great Britain as a neutral power, all these evils would have been averted.

It seems to me that the plain duty of Congress is to apportion the fund amongst these claimants *according to the merits of each case*, without reference to the particular acts of the Alabama, Florida, or Shenandoah, if his claim arises from the act or acts of any vessel *receiving aid from British*

ports. It was the duty of our Government to protect the persons and property of its citizens while engaged in lawful commerce upon the high seas to the extent of its power. Its *inability* to do so was a source of regret and mortification, and the wrongs that its citizens have suffered by this inability and which have thus far gone unredressed, may now be *repaired* by the just distribution of the money paid by England as part reparation for her wrongs.

The actual sufferers now asking to be paid their losses, are the persons who were compelled to pay *large sums for the* protection of their property as I have stated, and those who have suffered in the class represented by Mr. Metcalf, through the acts of vessels other than the Alabama, Florida, and Shenandoah, and while his loss was caused by the *actual destruction* of his property which was uninsured, he choosing to take a risk, the class of claimants I represent *could not take the risk and were compelled to pay for protection;* both are losers of amounts *clearly ascertainably* and *equally* entitled to be paid from this fund.

Section 12 of the act, distributing a portion of the fund, provides for the payment of all *actual* losses by *underwriters* through the acts of *any and all cruisers without limit*, and those who have thus (Read sec. 12,) lost by insuring have proved their claims before the court constituted by the act, and we ask to be provided for in the same manner, *deducting from* our claims all *dividends* from profits we may have received from the underwriters. A court has been established under the act and now exists to pass upon the merits of all claims coming before it. We who have paid war premiums, ask to be permitted to go before that court and prove and collect these claims without the intervention of

any of these companies, or their attorneys, as our guardians or legal advisers. The luxury is *too expensive* to be profitable, and too *uncertain* to be desirable. A mutual company is composed of its policy-holders. It has no capital but that paid in *as premiums*. The officers, clerks, rents and other expenses are paid from this fund. It *belongs entirely* to the policy-holder, and anything the company receives as a revenue is payable to the premium payers. You are told by the legal representatives of these companies that as a *company*, they have *nothing to do* with the moneys they shall recover as losses, but to *pay* them to the policy-holders who paid the premiums when the losses occurred *less the legal and other indefinite* expenses, but that they are entitled to receive them so as to *disburse* them to the holders of policies of *marine* as well as *war* risks, and claim the right to collect these moneys as *stake-holders*, so as to protect the rights of the persons having marine risks; and yet it is conceded that those mutual companies made more money in profits from the *war premiums* received than from those paying marine risks.

More than *eight millions* of dollars of *war* premiums have been paid to underwriters, while their losses under these risks are but $5,569,497.58, from which they made a profit of more than $2,000,000, a portion of which was paid back as profits, which accounts for the fact that but $6,146,219.71, of war premium claims have been filed, the Atlantic Mutual of New York, paying forty per cent. dividends from its profits while the war risks continued.

The aggregate profits of marine insurance were larger during the war than during *any like period* before or since, proving conclusively that in the distribution of profits among the policy-holders,

the holders of marine risks have received more than their fair share of profits. Ought this unequal distribution to be continued? The holder of a policy for ordinary marine risk has no claim before you. He suffered no loss by the acts of these cruisers unadjusted, and because he was a sharer in profits from a common fund to *his* advantage extends his right only to a settlement which has taken place upon the basis of moneys received by the companies in premiums and disbursed by them in losses paid. They are not losers in any sense which entitles them to receive any part of the fund in question.

What right of guardianship have the mutual companies in the *collection of these* war premiums? Every liability under the policy ceased more than ten years ago. The single right of the policy-holder to receive scrip dividends and profits from the companies made from the receipt of these premiums has been satisfied by such payment, and the policy has no longer any binding force or effect as between the assurer and assured. The persons who are entitled to receive this money from the companies asking for it are the representatives of the companies and if the mutual companies had a prior right to the fund the real owners are entitled to receive it.

The application to Congress to indemnify the persons who paid these war premiums and its action in regard to it being purely *ex gratia* growing out of no legal right. Legislation creating the right restores no rights or obligations to or against either party under the policy of insurance, and the company is in every legal sense a *stranger* to the rights and interests of these persons which they may acquire by the legislation asked for, to *the fund in question.*

For the reasons stated I respectfully ask that the merchants who have paid these war premiums and for which they have received no remuneration whatever, and by the payment of which the insurance companies were enabled to declare large dividends and largely increase their business, shall be by you considered as being with other *actual sufferers* of *loss first entitled* to be paid from the Alabama claims fund which may remain after the payment to the underwriters of all their actual losses as provided for in section 12 of the Act of 1873, relating to the Geneva Award, now in force.